Supreme Court, U.S.
FILED

No. 09-910

JAN 25 2010

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

ELIAS H. ATTEA, JR.,

Petitioner

v.

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK, *ET AL.*,

Respondents

On Petition for a Writ of Certiorari to the State of New York Supreme Court, Appellate Division, Third Judicial Department

PETITION FOR WRIT OF CERTIORARI

Kelly V. Zarcone
Counsel of Record
Zarcone Associates, PLLC
2350 North Forest Road, Suite 8A
Getzville, NY 14068
(716) 854-8002
Council for Petitioner

QUESTIONS PRESENTED

A New York State nonresident and Federally Licensed Indian Trader challenges New York State's constitutional authority in imposing income tax and related regulations directly on him as an Indian Trader otherwise governed by Federal congressional authority and, as a nonresident who does not work in New York, challenges the State's reallocation of income to New York based solely on insufficient proof of how much income was allocable outside of the State. This case presents two issues.

1. Whether New York State usurps the United States Congress' plenary power to regulate commerce with the Indian Tribes under Article 1, Section 8, Clause 3 of the US Constitution by imposing a direct tax and onerous record keeping burdens directly on a Federally Licensed Indian Trader.

2. Whether, if Indian Trader income is state taxable, New York State violates a nonresident's Due Process rights and the Commerce Clause by taxing an indiscriminate amount of a nonresident's income solely because there is insufficient proof to show the amount of income allocable to out of State sources.

PARTIES TO THE PROCEEDING

1. Elias H. Attea, Jr., Petitioner

2. Department of Taxation and Finance of the State of New York, Respondent

3. Jamie Woodward, Acting Commissioner of Taxation, Respondent

4. The Tax Appeals Tribunal of the State of New York, Respondent

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner states that it has no parent companies or nonwholly owned subsidiaries.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES vi

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

United States Constitution
Article 1 - The Legislative Branch
Section 8 - Powers of Congress
Clause 3 - Commerce Clause and
Reservation of Trade with Indians
..... 2

United States Constitution
Fourteenth Amendment
Section. 1. Due Process 3

N.Y. Tax. Law § 631 : NY Code - Section 631:
New York source income of a
nonresident individual 3

STATEMENT OF THE CASE 6

ARGUMENT 9

I. FEDERAL PREEMPTION 10

A. Taxation and the Indian Trader 10

B. Millhelm Attea Decision 12

C. New York State Department of Taxation and Finance Applied a legal standard to Mr. Attea which is inconsistent with this Court's prior rulings 15

II. NONRESIDENT CONSTITUTIONAL ISSUES 19

A. Standard promulgated by the Appellate Division, Third Department 20

B. Nonresident Due Process and Dormant Commerce Clause requirements 21

C. How the Appellate Division's standard violates nonresident's Due Process rights and the Commerce Clause. 23

REASONS FOR GRANTING THE PETITION ... 24

CONCLUSION 26

APPENDICES 27
Decision of Court of Appeals of New York .. 27
Decision of the Supreme Court, Appellate Division, Third Department, New York 28
Decision of the New York State Tax Appeals Tribunal 35
Decision of the Division Of Tax Appeals, State of New York 61

TABLE OF AUTHORITIES

Constitutional References

United States Constitution
Article 1 - The Legislative Branch
Section 8 - Powers of Congress
Clause 3 - Commerce Clause and Reservation of
Trade with Indians 2, 9, 10, 21-24, 26

United States Constitution
Fourteenth Amendment
Section. 1. Due Process 3, 9, 24, 26

Federal Statutes and Regulations

25 CFR 140 10

25 U.S.C. §261 10

Congressional Act of July 22, 1790, 1 Stat. 137 .. 10

Federal Cases

Allied-Signal, Inc. v. Director, Div. of Taxation, 504
U. S. 768, 777 (1992) 22

ASARCO Inc. v. Idaho Tax Comm'n, 458 U. S. 307,
315 (1982) 23

Central Machinery Company v. Arizona State Tax Commission, 448 U.S. 160, 100 S.Ct. 2592, (1980) 11

Container Corp. of America v. Franchise Tax Bd., 463 U. S. 159, 164 (1983) 22

Department of Taxation and Finance of New York, et. al. v. Milhelm Attea & Bros., Inc., etc. ("Milhelm Attea"), 512 U.S. 61, 114 S.Ct. 2028 (1994) . 7, 9, 10, 12-14, 25

Hunt-Wesson, Inc. v. Franchise Tax Bd. of Cal., 528 U. S. 458, 460 (2000) 22

Meadwestvaco v. Illinois (Meadwestvaco), 533 US ___ , 128 S. Ct. 1498 at 1505 (2008) 22, 23

Mobil Oil Corp. v. Commissioner of Taxes of Vt., 445 U. S. 425, 441-442 (1980) 22

Wagnon v. Prairie Band Potawatomi Nation ("Wagnon v. Prairie"), 126 S. Ct. 676; 163 L. Ed. 2d 429 (2005); *rehearing denied*, 126 S. Ct. 1187, 163 L. Ed. 2d 1142 (2006) 13

Warren Trading Post, 380 U.S. 685, 85 S.Ct. 1242 (1965) 10, 11, 15, 25

White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 100 S.Ct. 2578 (1980) 11, 13

Wisconsin v. J. C. Penney Co., 311 U. S. 435, 444 (1940) 23

New York State Laws

N.Y. Tax. Law § 631 3

IN THE

Supreme Court of the United States

No _____

ELIAS H. ATTEA, JR.,

Petitioner

v.

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK, *ET AL.*,

Respondents

On Petition for a Writ of Certiorari to the State of New York Supreme Court, Appellate Division, Third Judicial Department

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions this Court for a writ of certiorari to review the judgment of the New York State Court of Appeals affirming the decision of New York State Supreme Court, Appellate Division, Third Department in this case.

OPINIONS BELOW

The decision of the Court of Appeals dismissing the appeal is reported at 13 N.Y.3d 830, 918 N.E.2d 955, 890 N.Y.S.2d 441. The opinion of

the State of New York Supreme Court, Appellate Division Third Judicial Department is reported at 64 A.D.3d 909, 883 N.Y.S.2d 610. The decision of the New York Tax Appeals Tribunal is reported at DTA 820371. The decision of the State of New York Division of Tax Appeals is reported at 2006 WL 3391367 (N.Y. Div. Tax App.), DTA No. 820371.

JURISDICTION

The judgment of the State of New York Supreme Court, Appellate Division Third Judicial Department was entered on July 9, 2009. The judgment of the State of New York Court of Appeals dismissing the appeal was entered on October 27, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution
Article 1 - The Legislative Branch
Section 8 - Powers of Congress
Clause 3 - Commerce Clause and Reservation of Trade with Indians
The Congress shall have Power

...

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

...

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

United States Constitution
Fourteenth Amendment
Section. 1. Due Process
All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

N.Y. Tax. Law § 631 : NY Code - Section 631: New York source income of a nonresident individual
(a) General. The New York source income of a nonresident individual shall be the sum of the following:

(1) The net amount of items of income, gain, loss and deduction entering into his federal adjusted gross income, as defined in the laws of the United States for the taxable year, derived from or connected with New York sources, including:

(A) his distributive share of

partnership income, gain, loss and deduction, determined under section six hundred thirty-two, and

(B) his pro rata share of New York S corporation income, loss and deduction, increased by reductions for taxes described in paragraphs two and three of subsection (f) of section thirteen hundred sixty-six of the internal revenue code, determined under section six hundred thirty-two, and

(C.) his share of estate or trust income, gain, loss and deduction, determined under section six hundred thirty-four and

(2) The portion of the modifications described in subsections (b) and © of section six hundred twelve which relate to income derived from New York sources (including any modifications attributable to him as a partner or shareholder of a New York S corporation).

(b) Income and deductions from New York sources.

(1) Items of income, gain, loss and deduction derived from or connected with New York sources shall be those items attributable to:

(A) the ownership of any interest in real or tangible personal property in this state; or

(1) For purposes of this subparagraph, the term "real property located in this state" includes an interest in a partnership, limited liability corporation, S corporation, or non-publicly traded C corporation with one hundred or fewer shareholders (hereinafter the "entity") that owns real property that is located in New York and has a fair market value

that equals or exceeds fifty percent of all the assets of the entity on the date of sale or exchange of the taxpayer's interest in the entity. Only those assets that the entity owned for at least two years before the date of the sale or exchange of the taxpayer's interest in the entity are to be used in determining the fair market value of all the assets of the entity on the date of sale or exchange. The gain or loss derived from New York sources from the taxpayer's sale or exchange of an interest in an entity that is subject to the provisions of this subparagraph is the total gain or loss for federal income tax purposes from that sale or exchange multiplied by a fraction, the numerator of which is the fair market value of the real property located in New York on the date of sale or exchange and the denominator of which is the fair market value of all the assets of the entity on the date of sale or exchange.

(B) a business, trade, profession or occupation carried on in this state; or

(C.) in the case of a shareholder of an S corporation where the election provided for in subsection (a) of section six hundred sixty of this article is in effect, the ownership of shares issued by such corporation, to the extent determined under section six hundred thirty-two of this article; or...

. . .

STATEMENT OF THE CASE

The relevant facts of this case are largely undisputed. Elias H. Attea, Jr. was a federally licensed Indian trader who lived and worked exclusively in Tennessee. He was the owner and operator of JR Attea Wholesale, which engaged in wholesale distribution of tobacco products to Native Americans living on Indian reservations within the physical boundaries of New York State.

Mr. Attea's business was governed by the Bureau of Indian Affairs and U.S. Customs. Mr. Attea worked from his office and business headquarters in Ashland, Tennessee where he received bills and trade documents. He had no New York license to sell tobacco products or do business in New York State. (Record at 22.)

Mr. Attea timely filed nonresident income tax returns for the years at issue. He was required to file nonresident returns because he received income from the New York Estate of a deceased relative and because he received income as a shareholder of a New York S Corporation. Further, he erroneously paid New York income tax on 1099 income he received from the same New York S Corporation as commission from work performed wholly outside of New York State. There was no allocation to New York State for work performed in the State. (Record at 367.)

As part of his Federal Income Tax Return, Mr.

Attea listed his income under his Indian Trader's license on his Schedule C. After a lengthy residency audit and this Court's decision in Department of Taxation and Finance of New York, et. al. v. Milhelm Attea & Bros., Inc., etc. ("Milhelm Attea"), 512 U.S. 61, 114 S.Ct. 2028 (1994), auditors determined that Attèa's income from trade with Indians was taxable to New York State. (Record at 23, 307, 413.)

Auditors requested books and records for J.R. Attea Wholesale which Mr. Attea maintained were kept by the Federal Government employees, not himself.

Mr. Attea maintained that the State was preempted from interfering with his Indian Trade. The State maintained that it could tax Indian Trade income and further, that the State could require Mr. Attea to keep and turn over a specific set of books and records along with his business and personal bank records.

On April 22, 2004, after a series of agreed upon extensions of time, the New York State Department of Taxation and Finance issued a notice of deficiency. The assessment increased Mr. Attea's New York State income by all of his Indian Trade Schedule C income and disallowed all business related Schedule C expenses so that his New York business income exceeded his Federal business income by more and $1 million for the year 1993 and $1.5 million for 1992.

Mr. Attea followed tax procedure on appeal until reaching trial on January 26, 2006 in front of the New York State Tax Appeals Administrative Law

Judge (ALJ). The ALJ issued a decision denying Mr. Attea's appeal and stating that although Mr. Attea was a licensed Indian Trader trading with Indians, ran a multinational multi state business, and had business expenses, since Mr. Attea provided proof other than the books and records the auditor demanded of him, the State was powerless to determine any tax allocation other than 100 percent to New York or to allow him and reasonable business deductions.

Mr. Attea appealed that decision to the New York State Tax Appeals Tribunal. The Tribunal discussed Mr. Attea's use of Foreign Trade Zones which is not at issue here and discussed New York's taxation of Indian Traders. The court concluded that an Indian Trader's income is preempted under Federal law but then called that preemption an 'exemption' and applied stringent rules and burdens for taking advantage of such 'exemption.'

Mr. Attea commenced an Article 78 proceeding effectively appealing the Tribunal Decision to the New York State Supreme Court, Appellate Division, Third Department.

The Third Department entered a decision dated July 9, 2009. The Third Department sustained the 2004 assessment again treating the preemption like an 'exemption,' concluding that Mr. Attea had a 'heavy burden' of proving both that he traded exclusively with Indians and that he had no other business in the State. The court found that based on this Court's decision in Milhelm Attea, Mr. Attea, as

an Indian Trader, was subject to New York State tax laws, regulations and record keeping requirements.

The court further concluded that because Mr. Attea filed a nonresident return, New York had the power to audit the Federal portion of the return and assess tax based solely on Mr. Attea's inability to produce the specific set of documents required by auditors.

After finding Mr. Attea's income taxable as a nonresident, the Lower Court denied Mr. Attea's Due Process and Commerce Clause claims without explanation.

Mr. Attea timely filed an appeal of right to the New York State Court of Appeals based on his Constitutional claims regarding the preemption and improper tax allocation. On October 27, 2009, the Court of Appeals denied Mr. Attea's appeal based on no substantial Constitutional question.

Mr. Attea now appeals to the United States Supreme Court for Certiori to clarify it's decisions with respect to the Federal Preemption and nonresident income tax allocation.

ARGUMENT

This Court's review of the instant case is necessary to prevent New York State from usurping the long standing and exclusive authority of the federal government to regulate trade with Indians. By imposing a direct tax and business income/expense record keeping obligations on the income a federally licensed Indian trader derives

from his trade with Indians on Indian reservations, New York has become intensively involved in an area that has been the near exclusive provenance of the federal government since this country was established. *See* Milhelm Attea 512 U.S. at 70 citing Warren Trading Post, 380 U.S. 685, 687-689, 85 S.Ct. 1242, 1244-1245 (1965).

I. FEDERAL PREEMPTION

A. Taxation and the Indian Trader

The extensive history of federal regulation of Indian trading illustrates the inconsistency of New York's interpretation of recent Supreme Court precedent. Pursuant to its plenary power over the Indian Nations, Congress enacted regulations governing trade with Indians at early as 1790. *See* Warren Trading Post, 380 U.S. at 688, 85 S.Ct. at 1244, citing Congressional Act of July 22, 1790, 1 Stat. 137. See *e.g.* U.S. Const., Art. 1, §8, cl. 3; 25 U.S.C. §261, et. seq., 25 CFR 140, et. seq. Congress' extensive regulation of Indian Traders has continued through present time.

Title 25, section 261 of the U.S. Code grants the Commissioner of Indian Affairs the "sole power and authority" to appoint Indian traders and to make rules and regulations governing trade with the Indians.

This Court recognized Congress' preemption of state direct taxation of Indian traders in Warren Trading Post when it struck down an Arizona tax on a federally licensed Indian trader. The Court held:

> We think the assessment and collection of this tax would to a substantial extent frustrate the evident congressional purpose of ensuring that no burden shall be imposed upon Indian traders for trading with Indians on reservations except as authorized by Acts of Congress or by valid regulations promulgated under those Acts.

Warren Trading Post, 380 U.S. at 690-91, 85 S.Ct. 1245-46.

This Court has consistently recognized the federal government's near exclusive authority to govern trade with Indians. In Central Machinery Company v. Arizona State Tax Commission, 448 U.S. 160, 100 S.Ct. 2592, (1980), this Court struck down an Arizona sales tax imposed upon the sale of farm machinery by a seller to an Indian tribe on an Indian reservation. Citing Warren Trading Post, this Court held that state legislation of Indian trading was completely preempted by Congress' "comprehensive" regulation of the area. 448 U.S. at 166, 100 S.Ct. at 2596, citing Warren Trading Post, 380 U.S., at 691, n. 18, 85 S.Ct., at 1246. See also White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 100 S.Ct. 2578 (1980) (finding Arizona preempted from imposing motor fuel and motor carrier excise taxes on Indian tribe and logging company because of comprehensive Congressional regulation of the harvesting and sale of tribal timber).

B. Millhelm Attea Decision

Despite this well-established body of law finding that states are preempted from directly taxing Indian trading, New York State has nonetheless misinterpreted this Court's decision in Milhelm Attea and taken it as carte blanche to directly tax and heavily regulate Indian traders.

Milhelm Attea involved a challenge to New York State's authority to impose regulations on Indian traders aimed at collecting the state's cigarette tax from non-Indians who had purchased cigarettes from Indian retailers located on Indian reservations. In Milhelm Attea, this Court upheld state regulations that limited the quantity of untaxed cigarettes the traders could sell because the State showed evidence of documented and pervasive tax evasion by non Indians who purchased untaxed cigarettes on Reservations. The regulations were upheld on the basis that they were "reasonably necessary to the assessment or collection of lawful state taxes." 512 U.S. at 75, 114 S.Ct. at 2036.

The decision, however, recognized that the relevant inquiry in cases where the legal incidence of a tax does not fall on an Indian or Indian Trader is different from the inquiry in situations where a state imposes a direct tax and pervasive regulation on Indian traders. The opinion distinguished a regulatory burden, *i.e.* a situation where the incidence of the tax falls on the non-Indian consumer,

from a direct tax on an Indian Trader.

This Court found that unlike in its earlier cases striking down taxes where the incidence of tax was on the Indian trader, the incidence of the tax in Milhelm Attea fell upon "a class -- non-Indians -- whom the State had power to tax." 512 U.S. at 71, 114 S.Ct. at 2034.

The importance of the consideration of who bears the incidence of a state tax relating to Indian traders was again recognized by this Court in Wagnon v. Prairie Band Potawatomi Nation ("Wagnon"), 126 S. Ct. 676; 163 L. Ed. 2d 429 (2005); *rehearing denied*, 126 S. Ct. 1187, 163 L. Ed. 2d 1142 (2006). The issue in Wagnon was whether a state (Kansas) has authority to impose a motor fuel tax on initial non-Indian fuel distributor on that distributor's receipt of fuel from his supplier. In Wagnon, this Court reiterated that although the dispositive question in Indian tax cases is generally who bears the legal incidence of the tax,"even when a State imposes the legal incidence of its tax on a non-Indian seller, the tax may nonetheless be preempted if the transaction giving rise to tax liability occurs on the reservation and the imposition of the tax fails to satisfy the [White Mountain Apache Tribe et al. v. Bracker et al., 448 U.S. 136; 100 S. Ct. 2578; 65 L. Ed. 2d 665 (1980)] interest-balancing test." Wagnon v. Prairie at 682.

In upholding the regulations in Milhelm Attea, this Court recognized the danger that New York would overstep its regulatory bounds, stating that

the state's regulatory scheme"may present significant problems to be addressed in some future proceeding." The New York decisions in this case show that this Court's concern was well-placed.

At the outset of this issue, the State made its position clear.

An undated letter to Petitioner soon after the Milhelm Attea decision was released, the New York State Department of Taxation and Finance insisted that Petitioner's Indian Trader income is subject to New York's income tax, "[New York] believe[s] that the income reported on Schedule C and derived from wholesale tobacco sales to a reservation physically located within New York State is considered New York source income and must be allocated to New York." (Record at 307.)

In the 'Explanation of Adjustments' section of the assessments in this case, New York auditors explicitly asserted the right to tax income arising solely from Indian trading:

> It is [New York's] position that your activities as a seller of tobacco products are systematically and regularly carried on as a trade or business in this state with a fair amount of permanency and continuity. As such, this income would be subject to New York tax regardless of whether or not the activities were exclusively attributable to trade with Native Americans under your Indian Trader license.

(Record at 413.)

From the beginning, Petitioner relied on this Court's decisions for the premise that his income was not taxable to the State.

Although the state's arguments in the proceedings below focused on Petitioner's failure to comply with the state's regulatory requirements, footnote 5 in the state's brief before the Third Department makes clear that New York has not changed its position that its state income tax applies even to income Petitioner derives from trade with Indian's pursuant to his federal license. "In fact, it is far from clear that *Warren Trading Post Co. v. Arizona Tax Comm'n,* 380 U.S. 685 (1965), would bar the personal income tax at issue as applied to an Indian trader." Brief for Respondent Commissioner of Taxation and Finance at p. 22, fn. 5.

C. New York State Department of Taxation and Finance Applied a legal standard to Mr. Attea which is inconsistent with this Court's prior rulings

In upholding the state's income tax assessment, the Third Department erred in allowing the State to retroactively apply general tax regulations in order to tax the income of a Federally Licensed Indian Trader on his Indian Trade.

Again, the Third Department applied a standard of proof to Petitioner applicable to an exemption rather than a preemption, stating, "the

Tribunal was again unable to substantiate that the sales made by petitioner actually took place on reservations and were made to qualified tribal members - as required by petitioner's Indian trader licenses - or to formulate any allocation of what percentage of petitioner's sales might be tax exempt." Elias H. Attea v. Tax Appeals Tribunal (Lower Court Case), 64 A.D.3d 909, 911, 883 N.Y.S.3d 610, 612 (N.Y.App.3d 2009).

The Court said that it was Petitioner's burden to prove his income was derived solely from Indian trading, which can not be done without turning over all Indian trade books, US Customs records not even in Petitioner's possession, and all business and personal financial records. "It was incumbent upon petitioner to come forward with evidence establishing that [he] traded exclusively with Native Americans residing on Indian reservations..." Lower Court Case at 911.

The Court found that although Petitioner "produced documents indicating that he imported and shipped tobacco products to Indian reservations," the documents were not those required by the state and thus were not sufficient to meet his burden. Id. The Court found that Petitioner should have kept certain books and records desired by the auditor and that his US Customs and shipping documents, required under Federal law, were insufficient under New York regulations.

Petitioner submits that applying such detailed and personal regulation to his Indian Trade, unless

there is an affirmative reason to suspect that a Trader has traded outside of his license, is preempted by Federal law.

The books and records required of an Indian Trader are regulated by US Customs and the US Bureau of Indian Affairs. There is no room for the State's regulation in imposing its general record keeping regulations on an Indian Trader because Federal law preempts such action. Petitioner's burden of proof regarding this preemption should be significantly less stringent than if he were attempting to apply an exemption.

Even if the lawmakers of the State of New York had the authority to pass legislation requiring Indian Traders to keep income tax related records for their trades with Indians within the boundaries of New York State, there simply were no such regulations in place during the assessment that is at issue here. Absent law or regulation requiring Petitioner to keep certain books and records of his Indian Trades, there is a simple lack of fairness in taxing Mr. Attea because he did not keep records he had no notice of in the first place.

A careful reading of this Court's jurisprudence on the issue of taxation of Indian traders shows that the continuing extensive federal regulation of the area preempts direct state taxation of Indian trading. This Court's review of the instant case is needed to prevent New York State usurping the authority that the federal government has explicitly reserved for itself.

II. NONRESIDENT CONSTITUTIONAL ISSUES

If, as the State claims, this court determines that Petitioners trade with Indians is taxable to the State, then the Third Department imposed the same standard of proof of allocation for a nonresident as it does for a resident. In other words, the State assumes all income is taxable to itself unless the taxpayer can prove otherwise versus the previous nonresident standard of taxing only income affirmatively and reasonably connected with the State.

Here, Petitioner asserts that the New York Appellate Division, Third Department promulgated an unreasonable and unconstitutional standard of proof for nonresident small business owners who perform no work in New York State. This new standard removes any 'rational basis' for tax reallocation and allows a New York auditor to assess an indiscriminate amount of tax to a nonresident taxpayer who may not have sufficient business records to prove to the auditor's satisfaction exactly how much of his or her income should be allocated to the taxpayer's home state or elsewhere. While this standard is acceptable for State residents, it has not been acceptable for nonresidents who do not work in New York State in the past. This is particularly acute where the taxpayer works from one state directing multi national or multi state operations.

A. Standard promulgated by the Appellate Division, Third Department

For nonresidents, New York State Tax Law Section 631(a) allows New York State to tax income derived from or connected with New York Sources. On its face, the law passes constitutional muster and correctly taxes only the tax due to New York. However, in imposing its new burden and standard of proof, the New York State Courts have enlarged the scope of the statute and allowed the State to tax large amounts of nonterritorial income without providing a rational basis for doing so.

In interpreting New York State Tax Law Section 631, the Third Department states that it is, "incumbent on [the taxpayer] to come forward with evidence establishing that he ...had no income derived from or connected with New York Sources. Lower Court Case Slip Op at 5.

It is impossible to prove a negative (that anyone had no income derived from New York) as the State claims there could always be unknown income.

There is no mistake that the standard does not allow for a partial allocation. The nonresident taxpayer has a 'heavy burden to demonstrate by clear and convincing evidence that his business ... maintained no presence in New York State.' Lower Court Case Slip. Op. at 4.

The decision of the lower court allows the State to tax all net income of a nonresident who performs no work in the state, whether or not there is a

rational basis for such taxation and whether or not the tax allocation is reasonable if the taxpayer, as here, fails to meet that heavy burden of proof for whatever reason. Petitioner submits that by using such a standard, New York denies him his right to Due Process under the United States Constitution and also violates the dormant Commerce Clause with respect to his multinational, multi state business operated completely from Tennessee.

B. Nonresident Due Process and Dormant Commerce Clause requirements

If Mr. Attea's income is not preempted, then nonresident income tax laws and rules become applicable and Constitutional questions involving rational tax allocation become relevant. These constitutional issues were raised in the courts below but not given meaningful consideration.

Due Process and Commerce Clause tests and protections, as they relate to income tax, are designed to ensure that a state acts more reasonably than not and with rational basis toward nonresident individuals and businesses. Here, the decision of the New York State Appellate Division, Third Department, as affirmed by the New York State Court of Appeals, eviscerates any standard of reasonableness or rational basis by allocating nothing short of 100% of Mr. Attea's income to the State of New York when it is undisputed that he did not work in New York, he lived and worked in

Tennessee, and ran a multinational business which shipped its goods from outside of the United States through New York and New Jersey on the way to Indian Reservations, pursuant to the rules and regulation set up by the US Bureau of Indian Affairs and the US Customs Office.

Constitutional Due Process demands that there be "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax," as well as a rational relationship between the tax and the "values connected with the taxing State." Quill Corp. v. North Dakota, 504 U.S. 298, 306, 112 S.Ct. 1904 (1992).

This Court recently and clearly expressed the law regarding nonresident taxation of multinational and multi state businesses:

> The Due Process and Commerce Clauses forbid the States to tax "extraterritorial values." Container Corp. of America v. Franchise Tax Bd., 463 U. S. 159, 164 (1983); see also Allied-Signal, Inc. v. Director, Div. of Taxation, 504 U. S. 768, 777 (1992); Mobil Oil Corp. v. Commissioner of Taxes of Vt., 445 U. S. 425, 441-442 (1980). A State may, however, tax an apportioned share of the value generated by the intrastate and extrastate activities of a multistate enterprise if those activities form part of a " `unitary Business.' " Hunt-Wesson, Inc. v. Franchise Tax Bd. of Cal., 528 U. S. 458, 460 (2000)

Meadwestvaco v. Illinois (Meadwestvaco), 533 US ___ , 128 S. Ct. 1498 at 1505 (2008).

In Meadwestvaco, this Court went on to discuss the minimum connections to a State required to impose taxation and also recited the established law that even if minimum connections are established, the tax must be fairly apportioned. In reciting the Quill decision, this Court further clarified that the Due Process Clause requires that there be a rational relationship between the tax and the values connected with the taxing state.

In summing up the Constitutional requirements of both the Due Process and Commerce Clauses, the main test is whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state' "-that is, " `whether the state has given anything for which it can ask return.' " ASARCO Inc. v. Idaho Tax Comm'n, 458 U. S. 307, 315 (1982) (quoting Wisconsin v. J. C. Penney Co., 311 U. S. 435, 444 (1940)).

All of this Court's standards require a taxing state to act reasonably and with a rational basis for it's decision.

C. How the Appellate Division's standard violates nonresident's Due Process rights and the Commerce Clause.

The nonresident taxpayer burden of proof and removal of rational basis requirements from the

State's nonresident tax scheme violates due process rights of Mr. Attea and those in his position.

Mr. Attea contends that the State has a duty to act reasonably. Here, after acknowledging that a good portion of Mr. Attea's business income was earned out of state, New York taxed all of Mr. Attea's Schedule C business income simply because there was insufficient proof of how much income was attributable to any state.

Due Process and the Commerce Clause require some rational method of determining the tax imposed. The State is able to use models and indices, as it does in sales tax cases, to estimate business income and expenses of nonresidents. As this Court has noted in the past, the process does not need to be perfect, just reasonable. Here, any reasonable method of allocation would have produced less than 100% New York allocation. Petitioner seeks this Court's guidance in tax allocation standards for nonresident individuals who operate multi state business.

Further, Mr. Attea, as a Tennessee resident who did not avail himself to New York economic markets at all as an Indian Trader, received no benefit from the State of New York for which the State can ask for tax funds in return.

REASONS FOR GRANTING THE PETITION

The first reason this Court should hear this Case is because New York State's court of last resort

has decided an important federal question in a way that conflicts with the decision this Court regarding the Federal preemption of the direct taxation of Indian Traders.

This case deals with the State's attempt to control an area of law and commerce clearly and completely reserved to the Federal Government. New York State has taken the decision of this Court in Milhelm Attea and twisted it to rationalize its ability to usurp Federal authority and regulation.

Secondly, the standard of proof set forth by the Third Department for nonresidents is so onerous and impossible to meet, it gives New York State auditors carte blanche to assess nonresidents high amounts of New York State tax without a rational basis.

The New York State Court's decision (the "New York decision") impermissibly expands the scope of permissible state regulation of federally licensed Indian traders, a scope that was clearly set forth by this Court in Department of Taxation and Finance of New York, et. al. v. Milhelm Attea & Bros., Inc., etc., 512 U.S. 61, 114 S.Ct. 2028 (1994). The New York decision also allows the state of New York to impose its income tax on Indian traders, contrary to well-established precedent which preempts the states from imposing direct taxes on Indian traders. See Warren Trading Post Company v. Arizona State Tax Commission, 380 U.S. 685, 85 S.Ct. 1242 (1965). In addition, the New York decision improperly allowed New York to allocate 100% of the income of a nonresident running a multinational business from

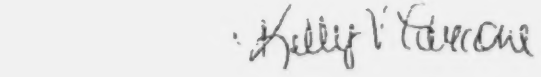
Tennessee to New York in violation of the Due Process and Commerce Clauses of the Constitution of the United States.

CONCLUSION

Based on the foregoing, Petitioner respectfully submits that this Petition for Writ fo Certiorari should be granted.

Dated: January 24, 2010

Respectfully submitted,



Kelly V. Zarcone, Esq.
Zarcone Associates, pllc
2350 North Forest Road, Suite 8a
Getzville, NY 14068
Tel: (716) 854 - 8002
Fax: (716) 693 - 5775

APPENDICES

13 N.Y.3d 830, 918 N.E.2d 955, 890 N.Y.S.2d 441, 2009 N.Y. Slip Op. 86978

Decision of Court of Appeals of New York.

In the Matter of **Elias H. ATTEA**, Jr., Appellant,

v.

TAX APPEALS TRIBUNAL, et al., Respondents.

Oct. 27, 2009.

Appeal dismissed without costs, by the Court sua sponte, upon the ground that no substantial constitutional question is directly involved.

N.Y.,2009.

Attea v. Tax Appeals Tribunal

64 A.D.3d 909, 883 N.Y.S.2d 610,
2009 N.Y. Slip Op. 05703
Decision of the Supreme Court, Appellate Division, Third Department, New York.

In the Matter of EliasH. ATTEA Jr., Petitioner,
v.
TAX APPEALS TRIBUNAL et al., Respondents.
July 9, 2009.

*909 Proceeding pursuant to CPLR article 78 (initiated in this Court pursuant to Tax Law § 2016) to review a determination of respondent Tax Appeals Tribunal which sustained an assessment of personal income tax imposed under Tax Law article 22.

Petitioner, a federally licensed Indian trader and a resident of Tennessee, commenced this proceeding challenging a determination assessing additional personal income tax for 1992 and 1993 arising from his wholesale tobacco sales, allegedly made in New York. Petitioner is the owner and operator of JR Attea Wholesale, which engages in wholesale distribution of tobacco products to Native Americans living on Indian reservations. In 1992, he filed a nonresident income tax return allocating to New York $244,841 of his approximately $7.8 million federal adjusted gross income; in 1993, he reported a federal adjusted gross income of approximately $3.8 million, with $190,827

allocated to New York. According to petitioner, the income attributable to JR Attea Wholesale, which was shown on Schedule C of his federal income tax return for those years, was generated solely from the sale of tobacco products to Native Americans residing on reservations. The Department of Taxation and Finance, however, informed petitioner that it believed the income listed on petitioner's Schedule Cs was New York source income instead, and requested scheduling of an appointment to audit petitioner's 1992 and 1993 tax returns. FN1

> FN1. The years 1990 and 1991 were initially included in the audit, but ultimately assessed separately due to the impending expiration of the statute of limitations. Respondent Tax Appeals Tribunal concluded that petitioner had not met his burden of proving that JR Attea Wholesale traded exclusively with Native Americans and maintained no presence in New York, and sustained notices of deficiency for those years; this Court confirmed that determination (288 A.D.2d 701, 732 N.Y.S.2d 722 [2001],lv. denied98 N.Y.2d 606, 98 N.Y.2d 606, 774 N.E.2d 222 [2002]).

As in a prior audit (*910Matter of Attea v. Tax Appeals Trib., 288 A.D.2d 701, 701, 732 N.Y.S.2d 722 [2001],lv. denied98 N.Y.2d 606, 746 N.Y.S.2d 457, 774

N.E.2d 222 [2002]), petitioner was less than forthcoming with respect to requested documentation. Although some shipping documentation was provided, the auditor was unable to use that data to "tie-in" to the information provided on the Schedule Cs. The auditor also met with Robert Haas, a New York customs broker, and Daniel Shea, the operator of a Foreign Trade Zone and the warehouse where petitioner housed his tobacco products. Although petitioner did not substantiate his labor expenses associated with Haas or Shea on his Schedule Cs, the auditor concluded that they were acting as petitioner's employee and agent, respectively, in New York. Moreover, while petitioner did not disclose information regarding inventory on his Schedule Cs, the auditor further concluded that, when stored in Shea's warehouse, much of petitioner's product-upon 62% of which duty had been paid-constituted inventory located in New York, and that petitioner was renting warehouse space from Shea to store and prepare his product for shipping. Inasmuch as the documents provided by petitioner did not permit the auditor to substantiate the purchases, gross receipts, income and expenses listed on petitioner's Schedule Cs, or that all sales were to Native Americans on Indian reservations, the Department **612 issued a notice of deficiency assessing additional income tax liability of $716,291.32 plus interest for 1992, and $359,361.98 plus interest for 1993.

Following a hearing at which petitioner submitted voluminous additional documentation, an Administrative Law Judge sustained the notice of deficiency, concluding that the Department was justified in allocating 100% of petitioner's income to New York-despite his status as a federally-licensed Indian trader-because he failed to provide any evidence to substantiate the allocation claimed on his nonresident income tax returns. Respondent Tax Appeals Tribunal affirmed, prompting this proceeding.

We confirm. As in the prior proceeding challenging the assessment of personal income tax for the years 1990 and 1991, "petitioner bears the burden of proving an erroneous tax assessment by clear and convincing evidence" (Matter of Clapes v. Tax Appeals Trib. of State of N.Y., 34 A.D.3d 1092, 1093-1094, 825 N.Y.S.2d 168 [2006],lv. dismissed8 N.Y.3d 975, 836 N.Y.S.2d 545, 868 N.E.2d 227 [2007] [internal quotation marks and citation omitted]; see *911Matter of Orvis Co., Inc. v. Tax Appeals Trib. of State of N.Y., 86 N.Y.2d 165, 178-179, 630 N.Y.S.2d 680, 654 N.E.2d 954 [1995],cert. denied516 U.S. 989, 116 S.Ct. 518, 133 L.Ed.2d 426 [1995]). Moreover, "it was incumbent upon petitioner[ ] to come forward with evidence establishing that [he] traded exclusively with Native Americans residing on Indian reservations and had no income 'derived from or connected with New York sources' (Tax Law § 631 [former (a)]), including income earned from 'a business, trade, profession or occupation carried on in

this [S]tate' (Tax Law § 631 [former (b)(1)(B)])" (Matter of Attea v. Tax Appeals Trib., 288 A.D.2d at 702, 732 N.Y.S.2d 722). In that regard, although petitioner argues that all state transactional record-keeping requirements are inapplicable to Indian traders due to preemption by federal law in this area, it is now well established that "Indian traders are not wholly immune from state regulation that is reasonably necessary to the assessment or collection of lawful state taxes" (Department of Taxation & Fin. v. Milhelm Attea & Bros., 512 U.S. 61, 75, 114 S.Ct. 2028, 129 L.Ed.2d 52 [1994];cf. Warren Trading Post Co. v. Arizona State Tax Commn., 380 U.S. 685, 691, 85 S.Ct. 1242, 14 L.Ed.2d 165 [1965]). Thus, having filed a New York nonresident tax return in which he allocated a portion of his federal adjusted gross income to New York, petitioner was required to produce books and records sufficient to establish the correctness of the amount allocated (seeTax Law § 697[b][1]; 20 NYCRR 158.1[a]).

As noted by respondent Commissioner of Taxation and Finance, petitioner's licenses authorized him to sell cigarettes and tobacco products only to Native Americans at the St. Regis and Tuscarora Indian Reservations. Nevertheless, while petitioner produced documents indicating that he imported and shipped tobacco products to Indian reservations, these records included no books of original entry for his business, such as sales journals, general ledgers, balance sheets,

expense receipts, income statements or bank statements. In light of these deficiencies, the Tribunal was again unable to substantiate that the sales made by petitioner actually took place on reservations and were made to qualified tribal members-as required by petitioner's Indian trader licenses-or to formulate any allocation of what percentage of petitioner's sales might be tax exempt. Accordingly, as in the prior proceeding, we conclude that petitioner failed to meet his "heavy burden of demonstrating by clear and convincing evidence that [his] business traded exclusively with Native**613 Americans and maintained no presence in this State," and we will not disturb the Tribunal's determination (Matter of Attea v. Tax Appeals Trib., 288 A.D.2d at 703, 732 N.Y.S.2d 722).

Finally, petitioner has not established by clear and cogent evidence that the taxes imposed were violative of the U.S. Constitution*912 (see Matter of Zelinsky v. Tax Appeals Trib. of State of N.Y., 1 N.Y.3d 85, 91, 96-97, 769 N.Y.S.2d 464, 801 N.E.2d 840 [2003],cert. denied541 U.S. 1009, 124 S.Ct. 2068, 158 L.Ed.2d 619 [2004]). Petitioner's remaining arguments have been considered and found to be lacking in merit.

ADJUDGED that the determination is confirmed, without costs, and petition dismissed.

ROSE, KAVANAGH and GARRY, JJ., concur.
N.Y.A.D. 3 Dept.,2009.
Attea v. Tax Appeals Tribunal
64 A.D.3d 909, 883 N.Y.S.2d 610, 2009 N.Y. Slip Op. 05703

Decision of the New York State Tax Appeals Tribunal

In the Matter of the Petition

of

ELIAS H. ATTEA, JR.
DECISION
for Redetermination of a Deficiency or Refund of New
DTA NO. 820371
York State Personal Income Tax under Article 22 of the
Tax Law for the Years 1992 and 1993.

Petitioner, Elias H. Attea, Jr., filed an exception to the determination of the Administrative Law Judge issued on November 13, 2006. Petitioner appeared by Schultz-Zarcone, LLP (Kelly V. Zarcone, Esq., of counsel). The Division of Taxation appeared by Daniel Smirlock, Esq. (Michelle M. Helm, Esq., of counsel).

Petitioner filed a brief in support of the exception and a reply brief. The Division of Taxation filed a brief in opposition. Oral argument, at petitioner's request, was heard on June 20, 2007 in Troy, New York.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether the imposition of additional personal income taxes determined by the Division of Taxation to be due for the years 1992 and 1993 on petitioner's income from the sale of cigarettes within the State of New York is preempted by Federal laws governing Foreign Trade Zones (***see***, 19 USC § 81 et seq.) and Licensed Indian Traders (***see***, 25 USC § 261 et seq.).

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

On or about April 11, 1993, petitioner filed a New York State Nonresident Income Tax Return for the year 1992 in which he allocated to New York $244,841.00 of the $7,779,513.00 set forth as his Federal adjusted gross income for that year.

On or about April 15, 1994, petitioner filed a New York State Nonresident Income Tax Return for the year 1993 in which he allocated to New York $190,827.00 of the $3,766,896.00 set forth as his Federal adjusted gross income for the same year.[1]

For both years in issue, petitioner was a nonresident of New York State who owned a business called "JR Attea Wholesale" located in Ashland, Tennessee, which had a separate address and tax identification number from petitioner, but accounted for its profits and losses on Schedule "C" attached to petitioner's Federal income tax return for both years in issue.

Petitioner was a federally licensed Indian Trader

who did not have a license from New York to operate a tobacco products wholesale or warehouse business. Further, petitioner received bills and trade documents at the Ashland Tennessee business address.

The years in issue were originally included in the prior audit together with the years 1990 and 1991, but a separate case number was later assigned to the years in issue because the earlier years, 1990 and 1991, had to be assessed sooner due to the expiration of the applicable statute of limitations on assessment.

Due to the fact that all four years were originally part of the same case, the same letter was used to request petitioner's books and records for all years. Since the issue of petitioner's domicile and his statutory residency were not in issue, the only remaining issue for the years 1992 and 1993 was the proper allocation of petitioner's Federal Schedule "C" income from his tobacco activities.

In a letter to petitioner, dated December 28, 1994, the Division of Taxation ("Division") informed him that it believed the income reported on Schedule "C" and derived from wholesale tobacco sales to a reservation physically located within New York State was New York source income and should have been allocated to New York. The letter proceeded to state:

> In addition, please call this office immediately upon receipt of this letter so that a mutually convenient audit appointment can be scheduled. Failure

to do so will result in an assessment based on the information at hand at this time.

We will concentrate our audit efforts on your reported Schedule C business expenses. As such, we require the following items:

1) Supply a copy of your 1992 and 1993 Form 1040, as originally filed.

2) Supply a copy of your 1992 and 1993 Form IT-203.

3) You did not report the components of gross profit on your 1991 Schedule C. Supply a complete breakdown of Schedule C gross profit (gross receipts less cost of goods sold) for 1991. If you failed to indicate the breakdown on your 1992 and 1993 Schedule C, supply the same for each year.

4) We will require all relevant books, records and documents required to compute the three factor allocation percentage for each year under audit. We will also require any back-up (i.e. invoices, receipts . . .) that you have maintained to support all expenses claimed on Schedule C for each year under audit.

In addition to this request for books and records, the

Division made several additional requests which went unheeded by petitioner. Petitioner failed to submit bank statements and any books of original entry, including sales journals, balance sheets, ledgers, invoices or expense receipts, trial balances, adjusting entries and income statements.

Pursuant to the auditor's log associated with the audit years in issue, petitioner was represented by no less than four individuals between 1997 and January 2004, to wit: Mr. Bailey, Mr. Cosgrove, Mr. Borek and Mr. Kanaley. None of these representatives produced the books and records requested by the Division prior to the issuance of the statutory notice herein.

By letters dated November 4, 2002 and April 18, 2003, the Division requested Mr. Borek to schedule an audit appointment to produce records which demonstrated how petitioner prepared his Schedule C. The record indicated that Mr. Borek did not respond to these requests.

The auditor's log indicated that on February 8, 2001, the Division was considering assessing tax for the years 1991 through 1997 and prepared an assessment for those years which included additional tax for 1992, 1993 and 1994 Schedule C income and disallowed Schedule C losses and net operating losses for the years 1995, 1996 and 1997. However, on January 15, 2002, the Division "changed course" and decided to assess only the years 1992 and 1993, which addressed the same issues addressed in the prior case involving 1990 and 1991.[2] The Division

received word of petitioner's last legal appeal on November 4, 2002. Prior to this time, the Division was holding the 1992-1993 audit in abeyance pending the outcome of the 1990-1991 legal appeals.

The auditor met with Mr. Gary Kanaley, petitioner's representative, on October 3, 2003 and January 5, 2004 and was presented with some shipping documentation which could not be tied into the Federal Schedule C's. The auditor was told that the expenses for the tobacco business were not accurately presented on the Schedule C and that some of the expenses listed may have been for an unrelated horse farm business. The auditor also met with one Mr. Robert Haas at the January 5, 2004 appointment. Mr. Haas died prior to hearing.

Mr. Robert Haas was employed by A. N. Derrringer Company, a customs broker, located in New York State which prepared documentation for, calculated and paid duty on behalf of importers on goods imported through the foreign trade zone ("FTZ") in Hamburg, New York.

Mr. Haas became familiar with petitioner's importation of cigarettes and specific issues related to the "manipulation" of the cigarettes, i.e., the affixation of government required health warnings. Since this "manipulation" process was causing delays at the FTZ, in the fall of 1991, petitioner caused Mr. Haas to be hired by the FTZ in Grand Island, New York, owned by Daniel Shea and also referred to as "Site 5". In addition to his wage from the FTZ, Mr.

Haas also received a salary of $500.00 per week or $2,000.00 per month from petitioner. Petitioner's 1993 Federal Schedule "C", which was filed for his wholesale cigarette business, indicated $54,675 in wage expenses on line "26" while the Schedule "C" for 1992 did not list any wages paid by JR Attea Wholesale.

Mr. Daniel Shea was the owner of Danason's Border Services, Inc. ("Danason's") and the operator of FTZ, Site 5 in Grand Island, New York. The auditor visited the site and interviewed Mr. Shea. Mr. Shea operated a public warehouse business as well as a foreign trade zone in which product on which duty had not been paid was housed at FTZ 23. Mr. Shea maintained duty paid and unpaid product in separate areas separated by a white line in accordance with U. S. Customs regulations. Mr. Shea's largest customer was JR Attea Wholesale. He maintained a product from only a few small customers other than petitioner. There was no written contract between Mr. Shea and petitioner and most communications between them were by telephone.

Tobacco products were shipped directly to the FTZ in Grand Island, New York from outside the United States and other FTZs. Products from other FTZs were shipped to U. S. Customs in Buffalo, New York where Customs entry was made and then were sent to the FTZ in Grand Island. The latter shipments from U. S. Customs were marked with a "D" after their zone lot numbers. Since these would have been

segregated from product on which duty had not been paid, they were housed in the public warehouse maintained by Mr. Shea at Site 5. Mr. Shea explained in an affidavit dated January 24, 2006, two days prior to hearing, that all records with regard to these "D" shipments were believed destroyed, but estimated that 20 to 30 percent were "D" shipments. However, the auditor's review of documents while visiting Site 5 in November or December of 2005 yielded an estimate of 30 to 60 percent. This figure was confirmed in petitioner's documentation submitted at hearing which, for 1992, indicated that over 62 percent of the product shipped out by Mr. Shea could be traced to product which came to him with excise tax paid. The result was that this product went to his public warehouse for later shipment or customizing.

Other than warehousing the product in a segregated area, Mr. Shea also performed the additional service for petitioner of breaking down petitioner's shipments in order to fill custom orders for customers which involved unloading, repackaging and reloading product onto delivery trucks. Petitioner's product on which duty had been paid was stored in Mr. Shea's warehouse, from which it was either shipped "as is" or broken down and reconstituted as a custom order. While remaining in the public warehouse, the product constituted inventory of petitioner located in New York State. Although he maintained an inventory, petitioner did not disclose any information on inventory on his Federal Schedule "C" for 1992 or

1993. Petitioner also failed to state any information with respect to his cost of goods sold on those schedules or in any other document he provided to the auditor during the period of the audit.

Petitioner's trades generally involved importing tobacco products from outside of the United States through the aforementioned FTZ and then trucking the product by U. S. Custom's bonded common carrier to federally recognized Indian reservations. Two former U. S. Customs inspectors, Robert Rugnetta and Timothy Regan, observed documentation that indicated petitioner imported goods through the FTZ which was destined for Indian reservations and that they were not aware of shipments by petitioner to other locations within New York State.

In processing shipments on which duty had been paid in New Jersey, the Grand Island FTZ gave said shipments a designation number beginning with "D", indicating that duty had been paid prior to arriving at the FTZ. As noted above, this product was segregated from other product in a public warehouse on the same premises operated by Mr. Daniel Shea and located within New York State.

On audit, it was established that petitioner made sales and shipped goods within the boundaries of New York State and used the public warehouse at FTZ, Site 5 to store his product until ready to ship. However, on the basis of the shipping documents produced by petitioner, the Division was unable to "tie-in" to the gross receipts or purchases figures. The

Division was never able to establish the cost of goods sold from the records produced or that all shipments went to Indian reservations. The expenses listed "below the line" of gross receipts could not be substantiated for the same lack of documentation.

Without adequate documentation to substantiate petitioner's income or expenses stated on his Schedule C's for 1992 and 1993, the Division issued a Statement of Personal Income Tax Audit Changes ("Statement"), dated February 19, 2004, which set forth an additional tax liability for 1992 of $716,291.32 and an additional tax liability for 1993 of $359,361.98. On the last page of the Statement, the Division set forth the following explanation of its adjustments:

> We have concluded that the income reflected on your Federal Schedule C has been generated from a business, trade, profession or occupation carried on in this state and therefore considered New York source income, taxable to you as a nonresident pursuant to Section 631 of the Tax Law. You have failed to meet your burden of proving that any of the income should be allocated to sources outside of New York.
>
> Regulation Sec. 132.4 states, in part, "A business, trade, profession or occupation (as distinguished from personal services as an employee) is carried on within

New York State by a nonresident when such nonresident occupies, has, maintains or operates desk space, an office, a shop, a store, a warehouse, a factory, an agency or other place where such nonresident's affairs are systematically and regularly carried on, not withstanding [sic] the occasional consummation of isolated transactions without New York State. This definition is not exclusive. Business is carried on within New York State if activities within New York State in connection with the business are conducted in New York State with a fair measure of permanency and continuity. A taxpayer may enter into transactions for profit within New York State and yet not be engaged in a trade or business within New York State. If a taxpayer pursues an undertaking continuously as one relying on the profit there from [sic] for such taxpayer's income or part thereof, such taxpayer is carrying on a business or occupation."

It is our opinion that your activities as a seller of tobacco products are systematically and regularly carried on as a trade or business in this state with a fair amount of permanency and continuity. As such, this income would

be subject to New York tax regardless of whether or not the activities were exclusively attributable to trade with Native Americans under your Indian Trader license.

Further, since you failed to provide substantiation for the expenses claimed on the Federal Schedule C, these items have been disallowed.

On April 22, 2004, the Division issued to petitioner a Notice of Deficiency for the years 1992 and 1993 which stated that it was based upon a recent audit of petitioner's records and that additional tax was being assessed in accordance with the Statement of Proposed Audit Changes referred to above. The amounts of tax and interest due for each year was set forth as follows:

Tax Period	Tax	Interest	Pen-alty	Pay-ments	Balance Due
1992	716,291.32	836,047.37	0	0	1,552,338.69
1993	359,361.98	374,092.91	0	0	733,454.89
Totals	**1,075,653.30**	**1,210,140.28**	**0**	**0**	**2,285,793.58**

Following the issuance of the Notice of Deficiency on April 22, 2004, petitioner submitted voluminous documentation to the Division which sought to

demonstrate that his returns accurately represented the income reported. Specifically, petitioner submitted handwritten notes of Robert Haas which purported to show "cigarette shipments delivered".[3]

Petitioner also submitted summary sheets, applications for FTZ admission and shipping information for what was purported to be all imports by petitioner for 1992 and 1993. The documentation was broken down by zone lot numbers and contained detailed information on import dates, cases of product entering, purchase price, duty paid, number of cases shipped, shipment destination and date. However, the Division was unable to use the documentation received from Mr. Kanaley or the documents received at hearing to "tie into" or confirm petitioner's gross receipts, purchases or cost of goods sold.

It was established that inventory remained at Mr. Shea's FTZ from less than a day to more than 40 days; that goods upon which excise tax had been paid were received by FTZ 23, Site 5 and placed in the public warehouse, segregated from non-taxed goods in the FTZ.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge determined that petitioner was conducting a business, trade or profession in New York State and that although

shipping documents were submitted by petitioner, it was impossible to confirm the accuracy of petitioner's tax returns in the absence of such records as sales journals, bank statements, general ledgers, balance sheets, expense receipts or invoices and income statements. Moreover, the Division was found to be justified in allocating all of petitioner's income to New York in the absence of information on which to base a more precise allocation. In the circumstances, the Administrative Law Judge found it unnecessary to reach petitioner's principal legal argument that Federal law preempts state taxation of his activities in New York State.

ARGUMENTS ON EXCEPTION

Petitioner argues in support of his exception that under the legal doctrine of preemption, the Division cannot impose tax on his activities in New York State because those activities are subject to pervasive regulation under Federal laws governing Foreign Trade Zones (***see***, 19 USC § 81 et seq.) and Licensed Indian Traders (***see***, 25 USC § 261 et seq.) thus leaving no room in which state tax law might operate. Petitioner also asserts that unlike his prior case, here it was demonstrated through the introduction into evidence of bills of lading and affidavits of customs inspectors that his shipments went to Indian reservations.

The Division argues in opposition that petitioner failed to meet his burden of proof by demonstrating

that he sold cigarettes only to tribal members on Indian reservations. Since petitioner failed to provide a complete set of books and records to be audited, it was impossible, according to the Division, to determine whether he sold only to Indians. The evidence introduced on this issue is said to be "incomplete and inadequate".

OPINION

The Supremacy Clause of the Constitution of the United States provides as follows:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding (U.S. Const. Art. VI, cl. 2).

Under this clause, Federal law may preempt state law through express preemption by statute, implied preemption through "occupation of the field" of law, or conflict between state and Federal regulation.

There are several cases in which the laws of New York were held to be preempted by the Federal laws governing foreign trade zones or similar duty-free

areas (***see, Hostetter v. Idlewild Bon Voyage Liquor Corp***, 377 US 324 [1964]; ***see also, McGoldrick v. Gulf Oil Corp.***, 309 US 414 [1940]); ***Ammex Warehouse Co, Inc. v. Procaccino***, 85 Misc. 2d 327 [Sup Ct, New York County, 1976]).

More recently, in ***Xerox Corp. v. County of Harris, Texas***, 459 US 145 [1982], the Supreme Court held that state property taxes on imported goods stored under bond in a customs warehouse and later exported from the United States are preempted by Congress's "comprehensive regulation of customs duties". In ***R. J. Reynolds Tobacco Co. v. Durham County, North Carolina***, 479 US 130, 152 [1986], however, the Court limited the holding of ***Xerox*** to goods destined for transshipment in foreign commerce and held that "consistent with the Supremacy Clause, a State may impose a nondiscriminatory ad valorem property tax on imported goods stored in a customs-bonded warehouse and destined for domestic manufacture and sale". The Court stated in part as follows:

> [T]he crucial issue is whether Congress has exercised its power under the Supremacy Clause to pre-empt ad valorem state taxation of imported goods that are stored in customs-bonded warehouses and that are destined for domestic markets . . . . In determining whether Congress has invoked this pre-emption power, we give primary

> emphasis to the ascertainment of congressional intent. This may be manifested in several ways. Chief among the indications of an intent to pre-empt is where Congress has legislated so comprehensively that it has left no room for supplementary state legislation. Pre-emption may also be found where state legislation would impede the purposes and objectives of Congress. In undertaking this analysis, however, we must be mindful of the principle that "federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons-either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained" (479 US, at 140, citations omitted).

The Court went on to apply these standards to the facts before it, stating as follows:

> It is difficult . . . to believe that the purposes in forming the customs-bonded warehouse scheme identified by the Court in *Xerox* would be disserved by the imposition of ad valorem property taxes on Reynolds' imported tobacco. It makes sense to conclude that state

> property taxation may discourage an importer whose goods are destined for transshipment in foreign commerce from using American ports and facilities, particularly when the same importer is granted an exemption from customs duties on all goods exported. Similar taxation would hardly deter an importer who, like Reynolds, stores goods in customs-bonded warehouses for up to two years for domestic manufacture and consumption . . . (479 US, at 144)

Even more recently, the United States Court of Appeals for the Ninth Circuit in ***United States v. 4,432 Mastercases of Cigarettes, More or Less***, 448 F.3d 1168 [9th Cir. 2006], relied on the Supreme Court's analysis in ***R. J. Reynolds*** in holding that the Foreign Trade Zone statute did not preempt the imposition of the California cigarette tax on cigarettes in a Foreign Trade Zone that were destined for domestic consumption. The court expressly distinguished the cases involving New York which are cited above, stating as follows:

> All of these cases addressed state regulation or taxation of goods that were in the stream of foreign commerce, as opposed to goods like [the cigarettes in this case] that were destined for domestic consumption. Moreover, all of these case pre-date the Supreme Court's

> opinion in *R. J. Reynolds*. We believe that, post-*R. J. Reynolds*, the operative framework is the transhipment/domestic consumption dichotomy, and we will straightforwardly follow it. Because [the cigarettes in this case] were bound for domestic consumption and there is not "any suggestion that taxation here would conflict with the central purpose" of our country's system of foreign trade zones, *R. J. Reynolds*, 479 U.S. at 148, we fail to see any conflict between imposition of the California cigarette tax and the goals of the FTZ Act (448 F. 3d, at 1193-1194).

Based on these cases, we do not think that the Foreign Trade Zone statute preempts the application of the personal income tax in the present case for two reasons. First, the cases stand for the proposition that state taxation is preempted only where the goods in transit enjoy a permanent exemption because they are to be re-exported but not where the benefits of Federal law represent merely a deferral until the goods enter the domestic market. In the present case, the cigarettes were not re-exported but were sold and consumed within the United States. There is no reason to think that the Congressional purpose of encouraging international trade and the use of United States ports as transshipment locations would be frustrated by the imposition of tax in the

present circumstances. Second, the personal income tax will apply to the income realized on the sale of the cigarettes unless, as discussed below, the imposition of tax is preempted by the Federal laws governing licensed Indian traders. It is not the presence of the cigarettes in the Foreign Trade Zone that gives rise to the tax at issue.

We now turn to the question whether the application of the personal income tax to petitioner is preempted by the Federal statutes governing licensed Indian traders, 25 USC § 261 et seq. The leading case on this subject is ***Warren Trading Post Co. v. Arizona State Tax Commn.*** (380 US 685 [1965]), in which the Supreme Court held that a generally applicable nondiscriminatory occupational tax on gross receipts could not be applied to income from sales to tribal members on a reservation realized by a person who was a licensed Indian trader under Federal law and therefore subject to regulation by the Bureau of Indian Affairs of the United States Department of the Interior. The Court explained its holding in part as follows:

> Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders.

* * *

> This state tax on gross income would put financial burdens on appellant or the Indians with whom it deals in addition to those Congress or the tribes have prescribed, and could thereby disturb and disarrange the statutory plan Congress set up in order to protect Indians against prices deemed unfair or unreasonable by the Indian Commissioner. And since federal legislation has left the State with no duties or responsibilities respecting the reservation Indians, we cannot believe that Congress intended to leave to the State the privilege of levying this tax. Insofar as they are applied to this federally licensed Indian trader with respect to sales made to reservation Indians on the reservation, these state laws imposing taxes cannot stand (380 US 690-692, footnotes omitted).

While the sweeping language of ***Warren Trading Post*** has been applied by the Court in a more tailored way in subsequent cases, those cases do not detract from the central holding of ***Warren Trading Post***- *viz.* a tax on a licensed Indian trader on receipts from dealings with tribal members on a reservation is preempted by Federal law. For example, in ***Department of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc.***, 512 US 61

[1994], the Court held that the Division was not preempted from applying a regulatory scheme to Indian traders in order to assure the collection of cigarette taxes on non-Indian purchasers of cigarettes on reservations. The Court's discussion of ***Warren Trading Post***, however, confirms the continuing vitality of that case as preventing a state "from imposing a tax on the income or gross sales proceeds of licensed Indian traders dealing with reservation Indians" (512 US, at 70).

The most recent Supreme Court case on this subject is ***Wagnon v. Prairie Band Potawatomi Nation***, 546 US 95 [2005]. There, the Court permitted the application of a state motor fuel tax to the receipt of fuel by off-reservation non-Indian distributors who subsequently delivered the fuel to Indian owned gas stations on a reservation because the tax was imposed on the receipt of fuel by the non-Indian distributor outside the reservation and not on the sale and delivery of the fuel on the reservation. By contrast, in the present case the personal income tax would be imposed on income which is realized only upon the sale of cigarettes. The issue here, on which petitioner has the burden of proof, is where and to whom the cigarettes were sold.[(4)]

The determination of the Administrative Law Judge found that it was unnecessary to address the question whether the imposition of the personal income tax in the present case is preempted by Federal law because petitioner had failed to provide

books and records to the Division's auditor as required by the Division's regulations. It may be questioned whether the Division should be permitted, in effect, to prescribe the standard of proof by which it will be determined whether the Division is precluded by Federal law from imposing tax. We conclude that the Division may properly require petitioner to maintain and provide books and records proving by clear and convincing evidence that he is an Indian Trader whose sales are exclusively to Indians on Indian reservations (Tax Law § § 658[a]; 697 [b]; 20 NYCRR 158.1).

In ***Department of Taxation and Finance v. Milhelm Attea & Bros.(supra)***, the Supreme Court held that licensed Indian traders are not immune from all regulation and that the Division's cigarette tax regulations which imposed record keeping and compliance obligations on a licensed Indian trader for the purpose of assuring the collection of tax on sales of cigarettes to non-Indian purchasers were not barred by the rule of ***Warren Trading Post***. The Court stated in part as follows:

> The state law we found pre-empted in *Warren Trading Post* was a tax directly "imposed upon Indian traders for trading with Indians". . . . That characterization does not apply to regulations designed to prevent circumvention of "concededly lawful" taxes owed by non-Indians . . . .

> Although broad language in our opinion in *Warren Trading Post* lends support to a contrary conclusion, we now hold that Indian traders are not wholly immune from state regulation that is reasonably necessary to the assessment or collection of lawful state taxes (512 US, at 74-75, citations omitted).

In the present case, the Division's record keeping regulations are relied on for the purpose of distinguishing petitioner's income from sales of cigarettes that is exempt from the personal income tax under the rule of ***Warren Trading Post***-*viz.* sales to reservation Indians on the reservation-from petitioner's income from other sales which is subject to tax. We think this falls within the category of regulation that is "reasonably necessary" to the determination of lawful state taxes as contemplated by the Court's opinion in ***Milhelm Attea***. If petitioner wishes to establish that income from sales is exempt from tax, he must comply with these regulations and maintain and produce for audit adequate books and records.

Accordingly, it is ORDERED, ADJUDGED, and DECREED that:

1. The exception of Elias H. Attea, Jr. is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Elias H. Attea, Jr. is denied; and

4. The Notice of Deficiency dated April 22, 2004 is sustained.

DATED: Troy, New York
December 20, 2007

/s/ Charles H. Nesbitt
Charles H. Nesbitt
President

/s/ Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/ Robert J. McDermott
Robert J. McDermott
Commissioner

1. The primary source of the income allocated to New York for both years was stated to be commission income.

2. ***Attea v. Tax Appeals Tribunal***, 288 AD2d 701[2001] ***lv denied*** 98 NY2d 606 [2002]. Petitioner's appeals ended on June 13, 2002 in the prior case with respect to 1990 and 1991.

3. The Haas notes were submitted by his lawyer, Edward Cosgrove, who averred that Mr. Haas had kept these notes of petitioner's trades in 1992 and 1993, although petitioner, in his affidavit, stated that he could not locate the Haas records for 1993. Further, in the 118 pages of the notes there is no mention

or reference to petitioner or his business.

4. Other cases on this subject are discussed in Taylor, "A Judicial Framework for Applying Supreme Court Jurisprudence to the State Income Taxation of Indian Traders," ___ Mich. St. Law Rev. __ (2007)(forthcoming), available at http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=scott_taylor [viewed December 10, 2007.

2006 WL 3391367 (N.Y.Div.Tax.App.)

Decision of the Division Of Tax Appeals, State of New York

*1 IN THE MATTER OF THE PETITION OF ELIAS

H

ATTEA, JR.

for Redetermination of a Deficiency or Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Years 1992 and 1993.

DTA No. 820371

November 13, 2006

DETERMINATION

Petitioner, Elias H. Attea, 294 Ed Harris Road, Ashland, TN 37015, filed a petition for redetermination of a deficiency or refund of New York State personal income tax under Article 22 of the Tax Law for the years 1992 and 1993.

A hearing was held before Joseph W. Pinto, Jr., Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on January 26, 2006 at 10:30 A.M., with all briefs submitted by May 12, 2006, which date began the six-month period for the issuance of this determination. Petitioner appeared by Schultz-Zarcone, LLP (Kelly V. Zarcone, Esq., of counsel). The Division of Taxation appeared by Mark F. Volk, Esq. (Michelle M. Helm, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation's issuance of a notice of deficiency to petitioner for additional personal income taxes determined to be due for the years 1992 and 1993 was arbitrary and capricious.

II. Whether petitioner was carrying on a trade or business in New York State and, if so, whether the Division's determination of tax on New York source income earned as a nonresident was proper.

III. Whether the Division of Taxation has the authority to tax the income of a federally licensed Indian Trader.

IV. Whether the Division of Taxation's determination of tax due from petitioner for the years in issue is a violation of petitioner's rights under the Due Process and Commerce Clauses of the United States Constitution.

FINDINGS OF FACT

Petitioner submitted with his brief 31 proposed findings of fact. Of the proposed findings, "1", "2", "3", "4", "10", "19" and "20" have been accepted and are incorporated into the facts below. Proposed findings "5", "6", "7", "8", "9", "11" through "18", "21", "23", "25", "27", "29" and "31" were rejected for lack of substantiation in the record. Proposed findings "22", "24", "26", "28" and "30" were found to be irrelevant and not incorporated into the findings of fact below. Petitioner resubmitted the same proposed findings with his reply brief, with the exception of proposed finding "15", which was rejected for lack of support in the record.

The Division of Taxation submitted 34 proposed findings of fact with its brief, all of which have been incorporated in the Findings of Fact below, except proposed findings "12", "13", "28", "33" and "34" which were statements of legal conclusions and not factual findings. In addition, proposed finding "5" was rejected as not having a credible basis in the record.

1. On or about April 11, 1993, petitioner filed a New York State Nonresident Income Tax Return for the year 1992 in which he allocated to New York $244,841.00 of the $7,779,513.00 set forth as his Federal adjusted gross income for that year.

*2 2. On or about April 15, 1994, petitioner filed a New York State Nonresident Income Tax Return for the year 1993 in which he allocated to New York $190,827.00 of the $3,766,896.00 set forth as his Federal adjusted gross income for the same year.[FN1]

3. For both years in issue, petitioner was a nonresident of New York State who owned a business called "JR Attea Wholesale" located in Ashland, Tennessee, which had a separate address and tax identification number from petitioner, but accounted for its profits and losses on Schedule "C" attached to petitioner's Federal income tax return for both years in issue.

4. Petitioner was a federally licensed Indian Trader who did not have a license from New York to operate a tobacco products wholesale or warehouse business. Further, petitioner received bills and trade documents at the Ashland Tennessee business address.

5. The years in issue were originally included in the prior audit together with the years 1990 and 1991, but a separate case number was later assigned to the years in issue because the earlier years, 1990 and 1991, had to be assessed sooner due to the expiration of the applicable statute of limitations on assessment.

6. Due to the fact that all four years were originally part of the same case, the same letter was used to request petitioner's books and records for all years. Since the issue of petitioner's domicile and his statutory residency were not in issue, the only remaining issue for the years 1992 and 1993 was the proper allocation of petitioner's Federal Schedule "C" income from his tobacco activities.

7. In a letter to petitioner, dated December 28, 1994, the Division of Taxation informed him that it believed the income reported on Schedule "C" and derived from wholesale tobacco sales to a reservation physically located within New York State was New York source income and should have been allocated to New York. The letter proceeded to state:

> In addition, please call this office immediately upon receipt of this letter so that a mutually convenient audit appointment can be scheduled. Failure to do so will result in an assessment based on the information at hand at this time.
>
> We will concentrate our audit efforts on your reported Schedule C business expenses. As such, we require the following items:
>
> 1) Supply a copy of your 1992 and 1993 Form 1040, as originally filed.
>
> 2) Supply a copy of your 1992 and 1993 Form IT-203.
>
> 3) You did not report the components of gross profit on your 1991 Schedule C. Supply a

complete breakdown of Schedule C gross profit (gross receipts less cost of goods sold) for 1991. If you failed to indicate the breakdown on your 1992 and 1993 Schedule C, supply the same for each year.

4) We will require all relevant books, records and documents required to compute the three factor allocation percentage for each year under audit. We will also require any back-up (i.e. invoices, receipts...) that you have maintained to support all expenses claimed on Schedule C for each year under audit.

*3 8. In addition to this request for books and records, the Division made several additional requests which went unheeded by petitioner. Petitioner failed to submit bank statements and any books of original entry, including sales journals, balance sheets, ledgers, invoices or expense receipts, trial balances, adjusting entries and income statements.

9. Pursuant to the auditor's log associated with the audit years in issue, petitioner was represented by no less than four individuals between 1997 and January 2004, to wit: Mr. Bailey, Mr. Cosgrove, Mr. Borek and Mr. Kanaley. None of these representatives produced the books and records requested by the Division prior to the issuance of the statutory notice herein.

10. By letters dated November 4, 2002 and April 18, 2003, the Division requested Mr. Borek to schedule an audit appointment to produce records which demonstrated how petitioner prepared his Schedule C. The record indicated that Mr. Borek did not respond to these requests.

11. The auditor's log indicated that on February 8, 2001, the Division was considering assessing tax for the years 1991 through 1997 and prepared an assessment for those years which included additional tax for 1992, 1993 and 1994 Schedule C income and disallowed Schedule C losses and net operating losses for the years 1995, 1996 and 1997. However, on January 15, 2002, the Division "changed course" and decided to assess only the years 1992 and 1993, which addressed the same issues addressed in the prior case involving 1990 and 1991.[FN2] The Division received word of petitioner's last legal appeal on November 4, 2002. Prior to this time, the Division was holding the 1992-1993 audit in abeyance pending the outcome of the 1990-1991 legal appeals.

12. The auditor met with Mr. Gary Kanaley, petitioner's representative, on October 3, 2003 and January 5, 2004 and was presented with some shipping documentation which could not be tied into the Federal Schedule C's. The auditor was told that the expenses for the tobacco business were not accurately presented

on the Schedule C and that some of the expenses listed may have been for an unrelated horse farm business. The auditor also met with one Mr. Robert Haas at the January 5, 2004 appointment. Mr. Haas died prior to hearing.

13. Mr. Robert Haas was employed by A. N. Derrringer Company, a customs broker, located in New York State which prepared documentation for, calculated and paid duty on behalf of importers on goods imported through the foreign trade zone ("FTZ") in Hamburg, New York.

14. Mr. Haas became familiar with petitioner's importation of cigarettes and specific issues related to the "manipulation" of the cigarettes, i.e., the affixation of government required health warnings. Since this "manipulation" process was causing delays at the FTZ, in the fall of 1991, petitioner caused Mr. Haas to be hired by the FTZ in Grand Island, New York, owned by Daniel Shea and also referred to as "Site 5". In addition to his wage from the FTZ, Mr. Haas also received a salary of $500.00 per week or $2,000.00 per month from petitioner. Petitioner's 1993 Federal Schedule "C", which was filed for his wholesale cigarette business, indicated $54,675 in wage expenses on line "26" while the Schedule "C" for 1992 did not list any wages paid by JR Attea Wholesale.

*4 15. Mr. Daniel Shea was the owner of Danason's Border Services, Inc. ("Danason's") and the operator of FTZ, Site 5 in Grand Island, New York. The auditor visited the site and interviewed Mr. Shea. Mr. Shea operated a public warehouse business as well as a foreign trade zone in which product on which duty had not been paid was housed at FTZ 23. Mr. Shea maintained duty paid and unpaid product in separate areas separated by a white line in accordance with U. S. Customs regulations. Mr. Shea's largest customer was JR Attea Wholesale. He maintained a product from only a few small customers other than petitioner. There was no written contract between Mr. Shea and petitioner and most communications between them were by telephone.

16. Tobacco products were shipped directly to the FTZ in Grand Island, New York from outside the United States and other FTZs. Products from other FTZs were shipped to U. S. Customs in Buffalo, New York where Customs entry was made and then were sent to the FTZ in Grand Island. The latter shipments from U. S. Customs were marked with a "D" after their zone lot numbers. Since these would have been segregated from product on which duty had not been paid, they were housed in the public warehouse maintained by Mr. Shea at Site 5. Mr. Shea explained in an affidavit dated January 24, 2006, two days prior to hearing, that all records with regard to these "D" shipments were believed destroyed, but estimated that 20 to 30 percent

were "D" shipments. However, the auditor's review of documents while visiting Site 5 in November or December of 2005 yielded an estimate of 30 to 60 percent. This figure was confirmed in petitioner's documentation submitted at hearing which, for 1992, indicated that over 62 percent of the product shipped out by Mr. Shea could be traced to product which came to him with excise tax paid. The result was that this product went to his public warehouse for later shipment or customizing.

17. Other than warehousing the product in a segregated area, Mr. Shea also performed the additional service for petitioner of breaking down petitioner's shipments in order to fill custom orders for customers which involved unloading, repackaging and reloading product onto delivery trucks. Petitioner's product on which duty had been paid was stored in Mr. Shea's warehouse, from which it was either shipped "as is" or broken down and reconstituted as a custom order. While remaining in the public warehouse, the product constituted inventory of petitioner located in New York State. Although he maintained an inventory, petitioner did not disclose any information on inventory on his Federal Schedule "C" for 1992 or 1993. Petitioner also failed to state any information with respect to his cost of goods sold on those schedules or in any other document he provided to the auditor during the period of the audit.

18. Petitioner's trades generally involved importing tobacco products from outside of the United States through the aforementioned FTZ and then trucking the product by U. S. Custom's bonded common carrier to federally recognized Indian reservations. Two former U. S. Customs inspectors, Robert Rugnetta and Timothy Regan, observed documentation that indicated petitioner imported goods through the FTZ which was destined for Indian reservations and that they were not aware of shipments by petitioner to other locations within New York State.

*5 19. In processing shipments on which duty had been paid in New Jersey, the Grand Island FTZ gave said shipments a designation number beginning with "D", indicating that duty had been paid prior to arriving at the FTZ. As noted above, this product was segregated from other product in a public warehouse on the same premises operated by Mr. Daniel Shea and located within New York State.

20. On audit, it was established that petitioner made sales and shipped goods within the boundaries of New York State and used the public warehouse at FTZ, Site 5 to store his product until ready to ship. However, on the basis of the shipping documents produced by petitioner, the Division was unable to "tie-in" to the gross receipts or purchases figures. The Division was never able to establish the cost of goods sold from the

records produced or that all shipments went to Indian reservations. The expenses listed "below the line" of gross receipts could not be substantiated for the same lack of documentation.

21. Without adequate documentation to substantiate petitioner's income or expenses stated on his Schedule C's for 1992 and 1993, the Division issued a Statement of Personal Income Tax Audit Changes ("Statement"), dated February 19, 2004, which set forth an additional tax liability for 1992 of $716,291.32 and an additional tax liability for 1993 of $359,361.98. On the last page of the Statement, the Division set forth the following explanation of its adjustments:

> We have concluded that the income reflected on your Federal Schedule C has been generated from a business, trade, profession or occupation carried on in this state and therefore considered New York source income, taxable to you as a nonresident pursuant to Section 631 of the Tax Law. You have failed to meet your burden of proving that any of the income should be allocated to sources outside of New York.
>
> Regulation Sec. 132.4 states, in part, "A business, trade, profession or occupation (as distinguished from personal services as an employee) is carried on within New York State by a nonresident when such nonresident occupies, has, maintains or operates desk space, an office, a shop, a store, a warehouse, a factory, an agency or other place where such

nonresident's affairs are systematically and regularly carried on, not withstanding [sic] the occasional consummation of isolated transactions without New York State. This definition is not exclusive. Business is carried on within New York State if activities within New York State in connection with the business are conducted in New York State with a fair measure of permanency and continuity. A taxpayer may enter into transactions for profit within New York State and yet not be engaged in a trade or business within New York State. If a taxpayer pursues an undertaking continuously as one relying on the profit there from [sic] for such taxpayer's income or part thereof, such taxpayer is carrying on a business or occupation."

It is our opinion that your activities as a seller of tobacco products are systematically and regularly carried on as a trade or business in this state with a fair amount of permanency and continuity. As such, this income would be subject to New York tax regardless of whether or not the activities were exclusively attributable to trade with Native Americans under your Indian Trader license.

*6 Further, since you failed to provide substantiation for the expenses claimed on the Federal Schedule C, these items have been disallowed.

22. On April 22, 2004, the Division of Taxation issued to petitioner a Notice of Deficiency for the years 1992

and 1993 which stated that it was based upon a recent audit of petitioner's records and that additional tax was being assessed in accordance with the Statement of Proposed Audit Changes referred to above. The amounts of tax and interest due for each year was set forth as follows:

Tax Period	Tax	Interest	Penalty	Payments
1992	$716,291.32	$836,047.37	0	0
1993	$359,361.98	$374,092.91	0	0
Totals	$1,075,653.30	$1,210,140.28	0	0

23. Following the issuance of the Notice of Deficiency on April 22, 2004, petitioner submitted voluminous documentation to the Division which sought to demonstrate that his returns accurately represented the income reported. Specifically, petitioner submitted handwritten notes of Robert Haas which purported to show "cigarette shipments delivered".[FN3]

24. Petitioner also submitted summary sheets, applications for FTZ admission and shipping information for what was purported to be all imports by petitioner for 1992 and 1993. The documentation was broken down by zone lot numbers and contained detailed information on import dates, cases of product entering, purchase price, duty paid, number of cases

shipped, shipment destination and date. However, the Division was unable to use the documentation received from Mr. Kanaley or the documents received at hearing to "tie into" or confirm petitioner's gross receipts, purchases or cost of goods sold.

25. It was established that inventory remained at Mr. Shea's FTZ from less than a day to more than 40 days; that goods upon which excise tax had been paid were received by FTZ 23, Site 5 and placed in the public warehouse, segregated from non-taxed goods in the FTZ.

STATEMENT OF THE PARTIES' POSITIONS

26. Petitioner argues that the assessment issued by the Division was arbitrary and capricious and without a rational basis. Further, petitioner contends that the assessment herein was based solely on the facts and conclusions reached in the prior audit of petitioner for 1990 and 1991.

27. Petitioner maintains that the methodology utilized by the Division was without a rational basis and was not reasonable.

28. Petitioner contends that New York has no authority to tax income earned by him as a federally licensed Indian trader on trades with reservation Indians and that the records submitted provide substantiation that most of his shipments went to reservation Indians. Petitioner urges that any such taxation of this income is federally preempted.

29. Petitioner argues that to the extent that he has shown his trade was with Indians, New York State lacks the authority to tax his income therefrom. Further, petitioner contends that there is no evidence in the record to show that he traded with anyone other than Indians.

*7 30. Petitioner argues that although New York does have jurisdiction over him by virtue of his filing tax returns for 1992 and 1993, it does not have authority to tax income from a business without any nexus with New York. He maintains that such taxation is a violation of his due process and commerce clause rights under the U. S. Constitution. Petitioner contends that he maintained no office in New York, had no employees in New York, rented no space, solicited no business nor advertised in New York and had no New York customers thus demonstrating that he carried on no business in New York.

31. The Division of Taxation contends that petitioner bears the burden of proving that the additional tax assessed was erroneous and that the voluminous documentation submitted by petitioner at hearing, not on audit, did not prove its assessment was erroneous, but did support its position that the majority of cigarettes received at Mr. Shea's FTZ were duty paid and that the majority of his services consisted of repackaging custom orders, warehousing and then shipping, all the while acting as agent of petitioner and hosting his employee, Mr. Haas.

32. The Division argues that it is not preempted from taxing petitioner's income under the circumstances presented in this matter and that the broad preemptive effect of older case law has been curtailed by more recent decisions of the U.S. Supreme Court.

33. Finally, the Division disputes petitioner's contention that its taxation of his income violates the Due Process and Commerce Clauses of the U. S. Constitution, contending that petitioner has met the minimum contact requirements with New York State, that the tax is fairly apportioned, does not discriminate against interstate commerce and is fairly related to services provided by New York State.

CONCLUSIONS OF LAW

A. Upon audit of petitioner, on December 28, 1994, the Division of Taxation made a very specific request for petitioner's books and records with respect to his New York State Nonresident Income Tax Returns filed for 1992 and 1993. Petitioner essentially failed to submit any documentation to substantiate his income listed on the returns prior to the issuance of the Notice of Deficiency on April 22, 2004, nearly ten years later.

Pursuant to Tax Law § 689(e), petitioner bears the burden of proving that an assessment is erroneous. (See, Delia v. Chu, 106 AD2d 815, 484 NYS2d 204.) To this end, Tax Law § 658(a) provides that the tax commission may require any person to keep such records as it deems sufficient to show if that person is liable for tax under Article 22. The regulation promulgated thereunder, 20 NYCRR 158.1(a) provides:

> a) Every person subject to New York State income tax or liable for the collection thereof, and any person required to file a New York State return of information with respect to income, must keep such permanent books of account or records, including inventories, as are sufficient to establish the amount of gross income, deductions, credits and other matters required to be shown by such person in any New York State income tax return or New York State return of information.

*8 Having received returns from petitioner, the

Division, for the purpose of ascertaining the correctness of the returns, was entitled to examine or cause to have examined by its agent or representative, any books, papers, records, etc. bearing upon the matters required to be included in the returns (Tax Law § 697[b]).

There is no dispute that the Division had a right to ask for petitioner's substantiation and that petitioner had an obligation to both keep and have available for examination adequate records for the information provided on his returns. The fact that petitioner filed New York returns at all was an admission that he had New York income. Therefore, since it was petitioner's choice not to submit any substantiation to the auditor prior to the issuance of the notice, it cannot be said that the assessment was arbitrary and capricious.

Petitioner raised many possible reasons for his failures, including that the records were taken in the course of investigations and not returned and that the records were lost or destroyed over the long period of time involved in this case. However, he was unable to substantiate these claims or explain why so much documentation became available immediately before hearing, some eleven years after they were first requested by the Division. Based on what the Division was supplied, its assessment was not arbitrary or capricious. The Division was not given access to any original books of entry or any other documentation to

substantiate the allocation petitioner made on his return.

Petitioner also raised a concern that the assessment violated the Division's policy that an assessment should never be based on the facts and conclusions reached for prior years. This contention was based on petitioner's interpretation of an entry in the auditor's log of January 15, 2002, where she stated that the Division had decided to "change course" and just assess petitioner for 1992 and 1993, which years addressed the same issues addressed in the prior case involving 1990 and 1991. However, an earlier entry in the log explained that the Division had been considering assessing 1992 through 1997, a decision which would have encompassed 1994 Schedule C income and disallowed Schedule C losses and net operating losses for the years 1995, 1996 and 1997. The Division decided against this broad approach and chose to assess the years in issue here because the legal appeals for the assessment concerning 1990 and 1991 had just ended and the agreement with petitioner to hold 1992 and 1993 in abeyance was ended. Therefore, the Division's decision to assess the years 1992 and 1993 was made because the court case involving 1990 and 1991 had ended and the current years were no longer being held in abeyance and the fact that the Division no longer believed that combining these years with future years was appropriate. The fact that the issues which presented themselves in 1990 through 1994 were the

same or similar is irrelevant. The underlying audit policy for the guideline which cautions against issuing an audit adjustment based solely on the facts and conclusions reached in a prior audit was served in this case. Certainly, as in the prior case, petitioner produced very few books and records, but the records produced and the auditor's investigation were far different in the instant matter, providing an independent basis for the conclusions reached on virtually the same issues. (See New York Audit Manual Income Tax Audit Guidelines 8.1.9.1.)

*9 B. Having established that the Division of Taxation properly issued the assessment, it remains to be determined whether petitioner met his burden of proving that the deficiency was erroneous. (Tax Law § 689[e]; Delia v. Chu, supra.)

Petitioner provided virtually no support for its 1992 and 1993 returns prior to hearing. Although Mr. Kanaley, a prior representative, on October 3, 2003 and January 5, 2004 presented some shipping documentation which he could not tie in to the Federal Schedule C's, nothing of substance was submitted until hearing, when petitioner produced ten volumes of U. S. Customs documents, supplier invoices, shipping documents, handwritten notes from Robert Haas, and Danasons Border Services warehouse statements. In Matter of Jenkins Covington, N.Y. (Tax Appeals

Tribunal, August 25, 1988, confirmed 195 AD2d 625, 600 NYS2d 281, lv denied 82 NY2d 664), the Tribunal stated:

> Petitioners' failure to produce documentation concerning the transactions at issue during the audit is unfortunate since that was the appropriate time for adequate consideration by both parties of the documents and the nature of the transactions they represent. The formal nature of the hearing before the Administrative Law Judge operates against such discussion and analysis. While such documents can be reviewed post-hearing by the Administrative Law Judge, again the bilateral review and consideration that can occur during audit is absent.

As the Tribunal noted in Matter of Greenwald (Tax Appeals Tribunal, November 24, 1993), "it was petitioners who elected, for whatever unexplained reason, not to submit supporting documentation to the Division and any unanswered questions which arise as the result of our review of petitioners' evidence must necessarily weigh against them." Unfortunately, petitioner faces the same review here, where this forum has been deprived the bilateral consideration of such a voluminous amount of "new" evidence.

After the hearing, the Division examined the volumes submitted by the auditor and the affidavit of Edward Cosgrove, Esq. with attached handwritten notes of Robert Haas, and appended to the Division's brief a

chart of the evidence submitted by petitioner for 1992 which listed information taken from petitioner's documents, including the FTZ site from which cases were shipped; the date first received at the FTZ; the date available to ship to Danasons; entry date at Site 5 with taxes paid at Site 5; date received at Site 5 with taxes paid elsewhere; purchase price; duty paid; tax paid; entry fee; processing fee; total cases received at Site 5; total cases not received at Site 5; ship date; zone lot number or "BL" number if from Aruba; and cases shipped from current lot Site 5. After performing the exhaustive and tedious task of extracting the information from petitioner's documentation, the Division proceeded to analyze the information and draw its own conclusions therefrom, conclusions which not surprisingly were contrary to those drawn by petitioner from the same data.

*10 In his reply brief, petitioner objects to the Division's chart and the conclusions drawn therefrom, arguing that it is misleading, and the conclusions reached are inflammatory and not based on evidence in the record. However, it was petitioner who submitted the voluminous documentation into the record and the Division is entitled to analyze it and draw its own conclusions, as it would for any other evidence, just as petitioner has analyzed the same information and based his arguments thereon. The chart is a graphic depiction of data in the record which it has incorporated into its arguments. As such, it was

appropriately included in its brief. Petitioner, despite his protestations, does not challenge the facts set forth in the chart or the values tabulated by the Division for cases of product received at and shipped from Site 5 and where duty was paid.

C. Petitioner's return presented an immediate "red flag" or audit warning when it failed to allocate any tobacco sales from within New York State as New York source income. This mandated the request for substantiation of the allocation and when none was ever produced it left no alternative but to allocate all the income to New York.

Tax Law former § 631, in effect during the years at issue, provided as follows:

> (a) General. The New York source income of a nonresident individual shall be the sum of the net amount of items of income, gain, loss and deduction entering into his federal adjusted gross income, as defined in the laws of the United States for the taxable year, derived from or connected with New York sources, including:
>
> * * *
>
> (b) Income and deductions from New York sources.

(1) Items of income, gain, loss and deduction derived from or connected with New York sources shall be those items attributable to:

* * *

(B) a business, trade, profession or occupation carried on in this state;

* * *

(c) Income and deductions partly from New York sources. If a business, trade, profession or occupation is carried on partly within and partly without this state, as determined under regulations of the tax commission, the items of income, gain, loss and deduction derived from or connected with New York sources shall be determined by apportionment and allocation under such regulations.

The applicable regulation, 20 NYCRR former 131.4, in effect during the years at issue, provided that:

(a) (1) The New York adjusted gross income of a nonresident individual includes items of income, gain, loss and deduction entering into his Federal adjusted gross income which are attributable to a business, trade, profession or occupation carried on

in New York State.

(2) A business, trade, profession or occupation (as distinguished form personal services as an employee) is carried on within New York State by a nonresident when such nonresident occupies, has, maintains or operates desk space, an office, a shop, a store, a warehouse, a factory, an agency or other place where such nonresident's affairs are systematically and regularly carried on, notwithstanding the occasional consummation of isolated transactions without New York State. This definition is not exclusive. Business is carried on within New York State if activities within New York State in connection with the business are conducted in New York State with a fair measure of permanency and continuity. A taxpayer may enter into transactions for profit within New York State and yet not be engaged in a trade or business within New York State. If a taxpayer pursues an undertaking continuously as one relying on the profit therefrom for such taxpayer's income or part thereof, such taxpayer is carrying on a business or occupation. However, see section 131.10 of this Part with regard to the effect of the purchase and sale of property by a nonresident for such nonresident's own account.

*11 The Division maintains that based upon the records submitted and the facts which became apparent as a result of the Division's investigation, it must be concluded that petitioner was conducting a business, trade or profession in New York State. Upon review of

all the evidence submitted in this matter, it is determined that the Division's conclusion is correct.

The evidence adduced indicated that petitioner's goods were warehoused at FTZ 23, Site 5 by Mr. Shea at the request or on behalf of petitioner until they could be shipped or repackaged and shipped. However, even though goods were warehoused in New York, petitioner never produced records of a beginning and ending inventory for each of the years in issue and failed to provide the information on his Schedule "C" for either year. The fact that the documentation indicated that goods were kept by Mr. Shea in his public warehouse for petitioner prior to creating custom orders strongly suggested that the warehousing costs included the "rental" of space to house petitioner's goods in New York for various periods of time during the audit period. Petitioner failed to produce documentation to indicate otherwise, even though it was his burden to do so.

It was established that Mr. Shea was an agent of Mr. Attea operating in New York State. On many of the documents submitted by petitioner, Mr. Shea appears as an agent for petitioner. The Applications for Foreign-Trade Zone Admission and/or Status Designation list Mr. Shea as an agent for JR Attea Wholesale and the breadth of his involvement with petitioner's business was well documented. Nearly all

of his business came from JR Attea Wholesale, which represented handling, breaking down, repackaging and facilitating shipping of hundreds of thousands of cases of cigarettes on behalf of petitioner. In fact, the documents reflect that in 1992 over 60 percent of the total cases coming to Mr. Shea's warehouse had excise tax paid and were sent directly to the public warehouse for eventual shipping and customizing. The operation was so big it was necessary for petitioner to request that Mr. Haas be placed at FTZ 23, Site 5 to assist in his business operations, paying him a substantial salary for doing so.

Despite the voluminous shipping documentation submitted by petitioner, it still remains that without books of original entry, the existence of which was never demonstrated, the Division was powerless to confirm whether or not JR Attea Wholesale was making sales and shipping product to places other than Indian reservations. Simply, without sales journals, bank statements, general ledgers, balance sheets, expense receipts or invoices and income statements, it was impossible to confirm the accuracy of the numbers entered on petitioner's return and Schedule "C" for the years in issue. Therefore, the Division was justified in reallocating petitioner's income to New York at 100 percent, where petitioner gave it no basis for making a more precise allocation.

*12 Petitioner's affidavit and those of Mr. Shea, Mr. Haas, Mr. Rugnetta, Mr. Regan and Mr. Cosgrove are not helpful or probative of the ultimate inquiry into the conduct of the business affairs of JR Attea Wholesale or whether it made any sales other than those to Indian reservations. The former U. S. Customs agents, Mr. Rugnetta and Mr. Regan, stated only that they had observed only shipments to Indian reservations, never identifying the documentation underlying their conclusions. The affidavit of Mr. Haas confirmed that his salary was paid by petitioner, but his statement that no cigarettes imported by petitioner were ever warehoused in New York does not conform with the fact that petitioner's product remained in a New York warehouse pending repackaging and shipping. The Cosgrove affidavit states that attached to it were handwritten notes of Mr. Haas pertaining to trades made by JR Attea Wholesale in 1992 and 1993. However, there is no proof the notes were genuine or were in the handwriting of Mr. Haas. The affidavit of petitioner stated that he traded with Indian reservations and that he did not possess a New York cigarette agent license or a license to act as a wholesale or retail dealer. Petitioner never stated in his affidavit that the records he produced included all his cigarette sales in New York.

Given the issues not addressed by the affidavits, their self-serving nature and conflicts with other facts in evidence, the finder of fact herein will not be bound to

find facts based upon the contents of an affidavit. (Matter of Orvis v. Tax Appeals Tribunal, Tax Appeals Tribunal, January 14, 1993, annulled 204 AD2d 916, 612 NYS2d 503, revd 86 NY2d 165, 630 NYS2d 680, cert denied 516 US 989, 133 L Ed 2d 426.)

D. The fact that Mr. Haas was employed by petitioner in New York to perform services here; that petitioner maintained an inventory at the public warehouse operated by Mr. Shea; and the fact that Mr. Shea was compensated for his services in warehousing petitioner's product all indicated that JR Attea had more than just the slightest presence in New York State.

The Court of Appeals was clear in its rationale in Orvis:

> We think the foregoing survey of the decisional law discloses the true import of the physical presence requirement within the substantial nexus prong of the Complete Auto [Complete Auto Transit v. Brady, 430 US 274, 51 L Ed 2d 326] test under contemporary Commerce Clause analysis. While a physical presence of the vendor is required, it need not be substantial. Rather, it must be demonstrably more than a "slightest presence" (see, National Geographic Socy. v. California Bd. of Equalization, 430 US 551, 51 L Ed 2d 631). And it may be manifested by the presence in the taxing State of

the vendor's property or the conduct of economic activities in the taxing State performed by the vendor's personnel or on its behalf (Matter of Orvis Co. v Tax Appeals Tribunal, supra, 630 NYS2d, at 686-687).

*13 It is determined that the Division's conclusion that petitioner was carrying on a business in New York State was valid and that the record established the business had nexus with New York.

E. Although the Division argues that there was insufficient documentation to determine an allocation percentage pursuant to Tax Law § 210(3)(a) due to the lack of substantiation for receipts, property and payroll, this argument merely underscores the petitioner's failure to come forward with adequate documentation since the beginning of the audit to establish the accuracy of the information he provided on his returns for the years in issue, particularly the information on the Schedule "C".

F. Petitioner argues that the State of New York is without authority to tax income earned by a federally licensed Indian trader on his trade with Indians. However, this is not the issue presented herein. Petitioner, because he produced no books of original entry, never demonstrated that the sales he chose to disclose were all of his sales. The affidavits of Mr. Rugnetta and Mr. Regan did not prove that all of

petitioner's shipments went to Indian reservations; they only said those they reviewed appeared to be going to Indian reservations. They did not say, as petitioner argues now, that petitioner traded only with reservation Indians. Therefore, the "pass down" theory of preemption that petitioner wants to invoke is merely the creation and destruction of a straw man, while downplaying his failure to produce meaningful records of his business.

Therefore, it is not necessary to reach the question of whether the Indian trader statutes preempt a state from applying its individual income tax directly to any income resulting from an Indian trader's on-reservation sales to reservation Indians. None of the case law or statutes relied on by petitioner precludes the State of New York from requesting the books and records of a trader's business to determine if, in fact, his business activities are as portrayed or if such activities include off-reservation trade or on-reservation trade with non-Indians. (See Attea v. Tax Appeals Tribunal, supra, [where it stated that it was incumbent upon petitioners to come forward with evidence establishing that they traded exclusively with Native Americans residing on Indian reservations and had no income derived from or connected with New York sources..., including income earned from a business, trade, profession or occupation carried on in this State].)

G. Finally, Petitioner argues that New York is precluded by the Due Process and Commerce Clauses of the Constitution from taxing petitioner's income from his cigarette importing business because the State did not establish that there was a minimal connection, or nexus, between the interstate activities and New York, i.e., he maintained no office, rented no space, had no employees and undertook no business in New York.

However, the discussion above established that the evidence in this case demonstrated that petitioner had more than minimal contacts with New York and that petitioner was afforded ample opportunity to prove otherwise but did not. Further, petitioner's argument that, even if nexus existed, there was no rational basis for allocating an "overwhelming majority of business income to New York State" because the "brains and beauty" of the business lived in Tennessee is without merit. Petitioner did not meet his burden of proving that the overwhelming majority of his business income was derived elsewhere. By not producing any books of original entry for the business, the Division was powerless to draw the conclusions urged by petitioner.

*14 H. The petition of EliasH. Attea, Jr. is denied and the Notice of Deficiency, dated April 22, 2004, is sustained.

DATED: Troy, New York

/s/Joseph W. Pinto, Jr.
Administrative Law Judge

FN1. The primary source of the income allocated to New York for both years was stated to be commission income.

FN2. Attea v. Tax Appeals Tribunal, 288 AD2d 701, 732 NYS2d 722 lv to appeal denied by 98 NY2d 606, 746 NYS2d 457. Petitioner's appeals ended on June 13, 2002 in the prior case with respect to 1990 and 1991.

FN3. The Haas notes were submitted by his lawyer, Edward Cosgrove, who averred that Mr. Haas had kept these notes of petitioner's trades in 1992 and 1993, although petitioner, in his affidavit, stated that he could not locate the Haas records for 1993. Further, in the 118 pages of the notes there is no mention or reference to petitioner or his business.

2006 WL 3391367 (N.Y.Div.Tax.App.)